Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GREGORY THOMPSON, an individual; JAMES PIPPEN, an individual; PAUL PFINGST, an individual; COUNTY OF SAN DIEGO, a governmental entity; SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE, a governmental entity,

Petitioners,

v.

DAVID GENZLER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a suit for damages against a state prosecutor under 42 United States Code section 1983, does prosecutorial immunity protect the prosecutor against allegations that he coached an eyewitness to lie in court?

2. In a federal summary judgment motion, evidence is construed in the light most favorable to the non-moving party. When that evidence includes a final, judicially-undisturbed State appellate adjudication affirming the non-moving party's criminal conviction, may the federal court ignore unfavorable parts of the State adjudication?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner San Diego County District Attorney's Office respectfully prays that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on June 7, 2005.

CITATION OF OPINIONS

In a published Opinion, the Ninth Circuit Court of Appeals rejected defenses of absolute quasi-judicial (prosecutorial) immunity for a State court prosecutor and his investigator, against a convicted offender's civil rights claim that the prosecutor "suborned perjury . . . in order to secure a conviction." *Genzler v. Longanbach*, 410 F.3d 630, 635 (9th Cir. 2005). The challenged Opinion is reproduced in the Appendix.

In an earlier unpublished Opinion, the California Court of Appeal affirmed the offender's criminal convictions, based in part on that court's rejection of the same prosecutorial misconduct theory asserted by the offender in his federal lawsuit. That State Opinion is final, and is judicially undisturbed. It is also reproduced in the appendix, and can be found on LEXIS as *People v. Genzler*, 2002 Cal.App. Unpub. LEXIS 99 (2002). It was part of the record below.

JURISDICTION

The initial Opinion of the Court of Appeals for the Ninth Circuit was published September 27, 2004. A timely Combined Petition for Rehearing and Suggestion for

Rehearing En Banc was denied June 7, 2005, and the initial Opinion was withdrawn, and replaced by the challenged Opinion. App. 9-10. This petition for certiorari was filed within 90 days of the publication of the challenged Opinion.

This Court's jurisdiction is invoked under 28 United States Code section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

The challenged Opinion refers to violations of federal "constitutional rights," but does not identify any specific constitutional provision.[1]

42 United States Code (Relevant Portion):

> §1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

[1] This Court has held that a federal right must be identified before denying qualified immunity, but has not adopted such a rule for absolute immunity.

Federal Rules of Civil Procedure (Relevant Portion):

Rule 56. Summary Judgment

. . . .

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

Respondent (plaintiff below) is David Genzler. He was tried twice, and convicted twice, of feloniously killing one victim (Dustin Harless) by stabbing him in a fight, and feloniously assaulting another victim (Scott Davis) with the fatal knife. (The events occurred on April 18, 1996.)

Genzler sues the prosecutor (ex-Deputy District Attorney Peter Longanbach), his investigator (District Attorney Investigator Jeffrey O'Brien), and their supervisors up the

prosecutorial chain of command (ex-District Attorney Paul Pfingst and the other petitioners) for money damages under 42 United States Code section 1983, alleging that unethical prosecutorial acts led to the first conviction.

Mr. Genzler's arrest by police was concededly based on probable cause. *Genzler*, 410 F.3d at 639. The first jury convicted him of Mr. Harless' murder and Mr. Davis' aggravated assault, but that conviction was reversed. The second jury convicted him of Mr. Harless' manslaughter and Mr. Davis' aggravated assault. That conviction was affirmed. Mr. Genzler's convictions for assaulting Mr. Davis are not mentioned in the challenged Opinion, though the final State opinion was part of the record on appeal. *Genzler*, 410 F.3d at 632; App. 48.

Mr. Genzler fled the scene of his crimes, but two persons, assault victim Davis and Sky Flanders, gave police videotaped statements. About a week later, Ms. Flanders had her first meeting with the prosecutor's investigator. Some time later, she met with the prosecutor and his investigator together. The challenged Opinion explained what happened:

> After these meetings, Flanders changed her story. She testified at the preliminary hearing on May 23 and at both trials that she remembered little of the actual fight because she was distracted by the arrival of Scott Davis.

Genzler, 410 F.3d at 634.

The challenged Opinion described Genzler's version of events:

> According to Genzler's version of events, the fight on April 18 began when Harless charged Genzler

> and punched him in the face. Genzler said that Harless had grabbed him, slammed his face to the ground and pinned his arm, and that Davis then began kicking him in the head. Genzler said that he stabbed Harless to defend himself from the attack.

It also described Ms. Flanders' initial police statement:

> As Flanders described the events to police that day, Genzler got out of the car, Harless and Genzler exchanged punches, Harless "flipped" Genzler to the ground, and Genzler stabbed Harless while Harless held Genzler on the ground. Flanders also told police that day that Harless was a skilled wrestler who had been involved in previous street fights. Police audio- and video-taped the interview with Flanders.

It also described Mr. Davis' initial police statement:

> In his interview with police the day after the homicide, Davis stated that he saw Genzler jump out of his car and chase Harless and Flanders as they walked away from him, hand-in-hand. This account was manifestly inconsistent with the account Flanders had given police on the day of the homicide. Davis then met with O'Brien on April 25, and changed his story. In a report summarizing this April 25 meeting, O'Brien wrote that, "upon reflection," Davis considered that he had not seen the couple walking away from him hand-in-hand. At the May 23 preliminary hearing, Davis testified that Flanders and Harless were standing several feet apart when the fight began.

Genzler, 410 F.3d at 634-635.

While the challenged Opinion summarized Mr. Genzler's version of events, it ignored the facts adjudicated in the State Opinion in his criminal case. Pertinent parts could not be construed in a light favorable to Mr. Genzler. For example, the challenged Opinion ignores this part of the State Opinion:

> We believe the jury's rejection of Genzler's self-defense claim was not due to any misconduct occurring before or during the first trial but was because Genzler's claim that Harless was gouging his eye and Davis was kicking his head and arm were inconsistent with the physical evidence, i.e., the evidence overwhelmingly established Genzler did not suffer any injuries consistent with his claims. Genzler's conviction of involuntary manslaughter was the least possible offense under the circumstances of the case. We do not see any reasonable possibility, given the facts of this case, that the jury would have acquitted Genzler of any and all wrongdoing even if the asserted prosecutorial misconduct had not occurred. It is clear the jury's verdict was based on the evidence properly presented at the retrial and was not the result of any taint flowing from misconduct relating to the first trial.

App. 67.

The challenged Opinion holds that the prosecutor and his investigator were not individually entitled to prosecutorial immunity because, construing the evidence in the light most favorable to Genzler, there was a genuine issue of material fact about whether they were performing

advocacy functions, as opposed to police-type investigative work.[2] *Genzler*, 410 F.3d at 633.

REASONS FOR GRANTING THE WRIT

A. Importance.

This is the first case to deny prosecutorial immunity to an individual prosecutor for allegedly suborning eyewitness perjury "in order to secure a conviction." *Genzler*, 410 F.3d at 635. It is also the first case to deny prosecutorial immunity to a prosecutor for acts expressly found to be "in some degree related to trial preparation, even when viewed in the light most favorable to Genzler." *Genzler*, 410 F.3d at 643.

This is also the first case to deny a prosecutor's summary judgment immunity motion by ignoring the offender's final State adjudication, despite its judicial pedigree. (The challenged Opinion does not acknowledge ignoring anything.) See *Genzler*, 410 F.3d at 636.

The San Diego County District Attorney's Office (petitioner) has an interest in overturning the challenged Opinion. It will cause prosecutorial resources to be diverted to defending derivative civil lawsuits by convicted offenders, rather than to its true function of initiating and presenting criminal cases in court. Section 1983 lawsuits accusing prosecutors of misconduct should not be platforms for convicted offenders to relitigate facts that were litigated in criminal court before they were convicted.

[2] The Opinion ruled that *Heck v. Humphrey*, 512 U.S. 477 (1994) was inapplicable to Genzler's first conviction. *Genzler*, 410 F.3d at 635.